No. 06-1086

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IN THE

Supreme Court of the United States

ROBERT L. JORDAN,
Petitioner,

v.

ALTERNATIVE RESOURCES CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, EQUAL RIGHTS ADVOCATES, AND THE NATIONAL DISABILITY RIGHTS NETWORK, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici here, organizationally and through their members, represent individuals under federal statutes prohibiting dis-

[1] The parties have consented to the filing of this brief, and their written consent is on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

crimination, including Title VII of the Civil Rights Act of 1964; 42 U.S.C. §§ 1981, 1983; the Age Discrimination in Employment Act; and the Americans with Disabilities Act. *Amici* or their members counsel employees who have experienced workplace conduct that might be considered, or may ripen into, a hostile environment.[2]

Amici maintain an acute interest in this case because the decision below creates conflicting law as to the proper advice that attorneys should offer to clients or prospective clients who encounter instances of obvious bias on the part of others in the workplace. While a lawyer is required to render "candid advice" when asked for a professional opinion, MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1, the lines between what conduct is immediately actionable, almost actionable, and what might be rejected as "isolated" at some point in the future are not clear. For example, an employee seeking advice as to when she should complain because her supervisor openly used the word "nigger" should be advised that it is important to notify her employer in order to prevent further harassment and to protect her legal rights under this Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). If practicing in the Fourth Circuit, however, the attorney cannot make an easy call as to what advice is appropriate. As the Model Rules advise us, "advice couched in narrow legal terms may be of little value to a client, especially where practical considerations . . . are predominant." MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1, cmt. [2]. Thus, a lawyer in the Fourth Circuit may be compelled to advise the client that, while an early report of extremely offensive racist or sexist conduct may help the employer prevent a severe or pervasive hostile work environment, the employer may then

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[2] The NAACP has long supported fair employment practices, including vigorous enforcement of Title VII of the Civil Rights Act, and a construction of the Act that is consistent with the intent of its framers.

lawfully terminate the reporter. This conflict exemplifies the imbalance created by the decision below to the carefully crafted remedial scheme, which is calculated to prevent discrimination.[3] Fuller statements of interest for all *amici* are included in the appendix to this brief.

STATEMENT

This case concerns the application of Section 704(a) of Title VII, which makes it unlawful for an employer to discriminate against an employee who "has opposed any practice made an unlawful employment practice" by the Act. 42 U.S.C. § 2000e-3(a). Petitioner Robert L. Jordan, an African American, complained to his employer that a co-worker stated openly that "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them." (Court of Appeals Joint Appendix, p. 81.) Jordan also complained that, according to two other employees, the same individual had a history of making similarly offensive remarks. (*Id.*) Jordan was fired the following month.

Assuming that Jordan was fired because of his complaint, the district court granted the employers' motion to dismiss pursuant to Rule 12(b)(6), holding that Jordan had not engaged in "statutorily protected activity." (Petitioner's Appendix at 64a-66a.) After hearing and rehearing the case, a divided panel of the Fourth Circuit affirmed. The panel acknowledged the remark at issue was "unacceptably crude and racist," but that such "unacceptable racism" and indications that racist comments had been made in the past could not reasonably lead Jordan to the conclusion that the conduct was "likely to recur at a level sufficient to create a hostile work

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[3] Under the Americans with Disabilities Act, courts often adopt the Title VII analysis for harassment, *e.g.*, *Lanman v. Johnson County, Kansas*, 393 F.3d 1151, 1155 (10th Cir. 2004) (citing cases), and for retaliation, *e.g.*, *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1336 (11th Cir. 1999).

environment." (*Id.* at 9a-10a, 12a.) The court reasoned that obvious racism was "insufficient conduct about which to complain," because Title VII jurisprudence typically recognizes a hostile environment only after a series of unlawful acts. (*Id.* at 14a-15a.)

SUMMARY OF ARGUMENT

All lower courts agree that the opposition clause of Section 704(a) of Title VII protects employees who maintain a good faith reasonable belief that they are reporting a violation of law. Within that standard, however, courts have taken diverging paths. While this Court explicitly declined to announce a standard in *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001) (*per curiam*), the sharply-divided decision below has highlighted the critical need for uniformity, particularly given the clear incentives established by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

The current uncertain state of law ill-serves the objectives of Title VII because it discourages individuals from bringing hostile workplace conduct to their employer's attention for fear of reprisal. Whatever the precise contours of the objectively reasonable standard, there should be little doubt that Mr. Jordan's complaints about the unambiguously racist conduct at issue here, with potent connotations of enslavement, rape, and beastliness, should be protected.

ARGUMENT

I. PETITIONER ENGAGED IN PROTECTED ACTIVITY

A. The Content of the Remarks Reasonably Led Petitioner to Believe He Was Subjected to Unlawful Conduct.

The remarks at issue and the fact that the speaker had a history of making "similar offensive comments" reasonably

led Petitioner to conclude that his co-worker's conduct was unlawful. The statement, "They should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them," denigrated Petitioner's race and expressed a desire to carry out violence against people of his skin color. The symbols expressed in the remarks call forth a history of violent oppression against African Americans during centuries of being treated as chattel and subsequent history of Jim Crow laws.

Comparing the use of animalistic references to the term "nigger," the Fourth Circuit recognizes that "use of the word 'monkey' to describe African Americans" is "similarly odious." *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 298 (4th Cir. 2004). "To suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001). *Cf. Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting) ("In every culture, certain things acquire meaning well beyond what outsiders can comprehend").

Linking African Americans to primates conveys more than mere trivial disrespect; rather, calling people "black monkeys" endorses the historical view that African Americans are inferior to Caucasians. (*See* Eric Foner, *Forever Free, The Story of Emancipation & Reconstruction* 192-93 (2006).) Indeed, the term "monkeys" relegates African Americans to the status of non-persons or "subhumans," a view that undergirded racial oppression and facilitated systematic exclusion from basic rights of citizenship. (*See* N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321 (2004) (Duru) (citing Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro 1550-1812*, 28-29

(1968)); *see also* Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* 245-46 (1998).)

Dehumanizing blacks as extraordinarily sexual was also used to justify post-slavery lynchings. (*See* Duru, *supra* at 1327.) Invoking the widely held fear that black men had an unrestrained desire to rape white women, one prominent Georgian journalist announced: "if it takes lynching to protect woman's dearest possession from drunken, ravening beasts, then I say lynch a thousand a week." (*See* Duru, *supra* at 1327 (quoting Grace Elizabeth Hale, *Making Whiteness: The Culture of Segregation in the South, 1890-1940* 234 (1998)).)

B. The Lower Courts' Divergent Approaches to Protected Activity should be Harmonized.

"The dominant purpose" of Title VII "is to root out discrimination in employment." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). Congress sought the elimination of discrimination not only through force of private litigation but also through encouragement of voluntary compliance and remediation "without resort to the courts." *Id.* at 77-78. Consequently, the lower courts agree that Section 704(a) of Title VII protects against retaliation in the absence of an actual underlying violation.

> Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim. . . . [A] retaliation claim may succeed where no sex discrimination ever took place.

Jackson v. Birmingham Bd. of Educ. 544 U.S. 167, 187 (2005) (Thomas, J. dissenting) (citing cases).

In considering the reach of Section 704(a), this Court in *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (*per curiam*) declined to establish a specific standard for when the subject of an employee's complaint provides

protection from subsequent retaliation. Although all require a complainant to have "a reasonable good faith belief" of discrimination, the courts have nonetheless developed widely divergent approaches to the issue.

In the Seventh Circuit, for instance, a "reasonable good faith belief" means that an employer "may not retaliate against anyone for claiming a violation of Title VII unless that claim is 'completely groundless.'" *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002). Although the plaintiff in *Fine* lost her discrimination claim, the Court explained that the inquiry does not end with the entry of judgment on the underlying claim:

> Many claims might appear legitimate on the surface, but after discovery and a harder look at the full picture they turn out ultimately to lack merit. Under Title VII, a person may not be terminated for making such a grounded, yet unsuccessful, complaint.

Id. Other courts take a similar approach. *See, e.g., Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1118 n. 1 (8th Cir. 2006) (complaint clearly not frivolous).

In such cases, courts first look to common-sense experience to gauge the reasonableness of the employees' belief that he or she had been subjected to discrimination. In *Fine*, the plaintiff and her female co-workers had mistakenly perceived disparate treatment based on first hand observation, and in *Wallace*, the plaintiff complained of a few instances of lewd and sexually explicit conduct that fell short of a hostile environment. *Fine*, 305 F.3d at 752; *Wallace*, 442 F.3d at 1118.

Such standards have proven workable to weed out baseless discrimination allegations lacking in good faith. *See Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 889-91 (7th Cir. 2004) (retaliation claim properly dismissed because claim of hostile work environment was "utterly groundless" and did not meet

the reasonable, good faith test, consistent with *Clark County School Dist.*) In sum, these courts recognize the critical distinction between complaints of retaliation and discrimination for determining a violation of Section 704(a):

> "A claim for retaliation is not based upon [prohibited] discrimination, but instead upon an employer's actions taken to punish an employee who makes a claim of discrimination." [*Haas v. Kelley Servs., Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005)]. In general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim.

Wallace, 442 F.3d at 1118.

In contrast, the Fourth Circuit below analyzed the reasonableness of the employee's belief not upon the everyday experience of an employee subjected to vile racist remarks (with knowledge such remarks had been repeated "many times" before), but instead through the lens of a court assessing the propriety of an underlying hostile environment claim. The Court reviewed hostile environment case law to conclude that such claims typically comprise a series of acts. Thus, it concluded, Petitioner's complaint failed to fall within the definition of workplace harassment. (Pet. App. at 8a-9a; *id.* at 10a ("The complaint does not describe a workplace permeated by racism, by threats of violence, by improper interference with work, or by conduct resulting in psychological harm." (citing *Faragher*; 524 U.S. at 787-88).) While the court acknowledged that "the distinction between a racial slur and a hostile workplace may at a highly abstract level seem a difficult one for employees to manage," it nonetheless confined its inquiry to legal interpretations of the Act, rather than everyday experience, to determine whether Petitioner's complaint was reasonable. (Pet. App. at 14a ("Jordan overlooks the fact, which is fundamental to Title VII jurisprudence, that

there is a difference between an isolated racial slur . . . and the sort of severe or pervasive conduct that creates a hostile work environment."))

In effect, the court bypassed an inquiry grounded in everyday experience of laypeople: *i.e.*, the objectively reasonable standard at issue in Section 704(a). Particularly where, as here, employees are encouraged by workplace policies to report hostile conduct, an employee may reasonably perceive a duty to report obviously racist or sexist conduct that may not, in fact, amount to a cognizable hostile environment claim. One example of such a policy is that promulgated by the Alabama State Bar, which defines "harassment" to include "slurs, jokes, and other verbal, graphic or physical conduct relating to an individual's race." ALA. STATE BAR *Harassment Policy* at II, (published at www.abanet.org/barserv/library/k/personnel_policies/4679.pdf). While the State Bar does not limit its definition of "harassment" to only instances that are sufficiently severe or pervasive to alter the terms and conditions of employment, it still requires employees to report all "such conduct." *Id.* Such a policy is hardly unique.

Because of these differences, *amici* urge this Court to take up the question left open in *Clark County School Dist. v. Breeden*, and to create a uniform standard for protecting discrimination complainants from retaliation. The answer will provide clarity and uniformity in the law and should help preserve the primary objectives of the anti-discrimination statutes to root out and prevent discrimination in employment.

II. THE FOURTH CIRCUIT'S RULING DISCOURAGES INFORMAL RESOLUTION OF DISCRIMINATION COMPLAINTS

As attorneys on behalf of employees, *amici* or their members counsel individuals confronting discriminatory workplace conduct. Since this Court's decisions in *Faragher v.*

City of Boca Raton, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) in particular, *amici* regularly advise employees to promptly bring to the employers' attention racist or sexist conduct[4] in order to discourage further harassment and to preserve the employees' legal rights should the hostile behavior continue. The incentives for employers to create effective remedial mechanisms and for employees to promptly invoke those procedures are clear.

The Fourth Circuit changed the equation. In his brief, the Petitioner illustrated the manner in which the panel majority's opinion forces an employee facing hostile conduct to potentially sacrifice rights under either Section 703(a) or Section 704(a). After *Jordan*, attorneys may discourage an employee from attempting early informal resolution and to instead allow the conduct to escalate, though that would risk compromising the employee's legal rights under the *Faragher* and *Ellerth* affirmative defense. Alternatively, an attorney could direct an employee to complain immediately to the EEOC, thereby invoking the participation clause of Section 704(a).[5] Although such a course may better preserve the employee's legal rights for any eventual hostile environment or retaliation cause of action, it does so at the cost of escalating the complaint beyond the favored path of voluntary compliance and informal resolution, *see, e.g., Burlington Indus., Inc.*, 524

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[4] Unfortunately, overtly discriminatory expressions based on disability —including pervasive use of such terms as "cripple" or "retard" —have also permeated some workplaces. *See, e.g., Luttrell v. Certified Grocers Midwest, Inc.*, 2003 WL 22844239, at *3 (N.D. Ill. Dec. 1, 2003); *EEOC v. Luby's Inc.*, 2005 WL 3560616, at *5 (D. Ariz. Dec. 29, 2005); *Farrington v. Bath Iron Works Corp.*, 2003 WL 278172 (D. Me. Feb. 7, 2003).

[5] Unlike the opposition clause, many courts interpret the plain language of the participation clause to contain no reasonableness component and to provide greater legal protection from retaliation. *See, e.g., Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999), *cert. dismissed*, 528 U.S. 1146 (2000).

U.S. at 764, and arguably risks heightening retaliatory animus and workplace disruption.

CONCLUSION

The *per curiam* decision of this Court in *Clark County School Dist. v. Breeden* left open a critical question regarding the standards applied to employees such as Petitioner here who are faced with virulent expressions of racism in the workplace. The decision of the Fourth Circuit in this case cannot be harmonized with the breadth of Section 704(a) of Title VII or with the remedial imperative of the Act.

Amici request that this Court grant *certiorari* and reverse the decision of the court of appeals.

Respectfully Submitted,

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APPENDIX

APPENDIX

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias. The NAACP has long supported fair employment practices, including the vigorous enforcement of Title VII of the Civil Rights Act, and a construction of the Act that is consistent with the intent of its framers.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974), *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and is co-counsel in the current sex discrimination case of *Dukes v. Wal-Mart Stores*, in the United States District Court, Northern District of California. ERA has

appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). The issues raised in this case are of critical importance to women workers who are all too often subjected to highly offensive and degrading treatment on the basis of sex which creates a hostile work environment.

The National Disability Rights Network (NDRN) is the membership association of protection and advocacy (P&A) agencies that are located in all 50 states, the District of Columbia, the Native American community, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.